No. 00-152

**In The**

**Supreme Court of the United States**

ARTHUR S. LUJAN, an individual, in his official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California

*Petitioners,*

v.

G & G FIRE SPRINKLERS, INC.,

*Respondent*

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**On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

**OPPOSITION TO MOTION BY PETITIONERS FOR ORDER DISREGARDING [ALLEGED] IRRELEVANT AND IMMATERIAL MATTER, AND [ALLEGED] MATTERS OUTSIDE THE CERTIFIED RECORD IN RESPONDENT'S BRIEF AND FOR ORDER STRIKING RESPONDENT'S LODGING**

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ORIGINAL

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent submits that the motion by Petitioners is without merit. Accordingly, the motion should be denied.

## I

## PETITIONERS' VAGUE AND UNSUPPORTED CONTENTION THAT THERE ARE MATTERS SET FORTH IN RESPONDENT'S BRIEF WHICH ARE IRRELEVANT, IMMATERIAL, OR OUTSIDE THE RECORD, IS WITHOUT MERIT

DLSE asserts in its motion vaguely, and without any specificity, that there is reference to Notices to Withhold in Respondent's Brief at pages 2 through 6 which are not included in the Joint Appendix ("*Jt. App.*"). The assertion by DLSE is vague and unspecified, because it is not true. All of the facts described regarding the Notices to Withhold in Respondent's Brief are derived from the documents included in the Joint Appendix. All of the documents and facts were before the District Court, and Court of Appeals. Unlike DLSE, G&G's brief sets forth an accurate recitation of the facts contained in the record. G&G's brief includes citations to the Joint Appendix for each fact set forth therein.

There are no citations to the Joint Appendix for the facts set forth in DLSE's brief, because there is no evidence in the record to support the statement of facts by DLSE. *See, Petitioner's Brief*, at pp. 2-5. DLSE states, without any citation to law or the record that prime contractors are required to agree to a contractual provision that money can be withheld to cover unpaid wages and penalties. *Petitioner's Brief* at p. 4. DLSE fails to cite any law or fact for its statement, because none exists. DLSE cites Labor Code §1772 on page 3 of the brief. The statute merely states that employees of the prime contractor, and subcontractors, are deemed to be employed on the public works project. DLSE incorrectly states that DLSE issued Notices to Withhold after discovering that G&G failed to pay prevailing wages on the three projects. DLSE fails to cite any facts in the record. DLSE's statement is incorrect in several respects. As set forth in G&G's brief, DLSE's own notice of penalty



assessment shows that the seizure order which triggered the re-filing of this lawsuit did not assert any failure to pay wages. DLSE asserted that G&G had failed to provide payroll records to DLSE, but DLSE was unwilling and unable to establish that it ever requested the records before assessing the penalties. DLSE states that G&G did not either obtain an assignment of prime contractor's right to sue under Labor Code §§1730-1733, or assert a right of equitable subrogation, or pursue other state law remedies. Once again, DLSE's statement is unsupported by any citation to the record of this case. No citation is provided, because none exist. The purported facts were not material, because neither a prime contractor, nor a subcontractor, has the right to a hearing.

G&G believed that it was important to set forth an accurate statement of the facts, based on the record, because of DLSE's continual effort to evade, confuse, and distort the facts and record in this case.

As explained further below, there are only two facts set forth in the brief that were not before the District Court and Court of Appeals. The two facts are (1) DLSE's recent assertion of prosecutorial immunity for issuing the Notice to Withhold [a fact which did not exist until a couple of months ago]; and (2) the fact that the recent revision to the statutes challenged in this case was a result of this action [a fact which was not known until DLSE revealed, for the first time, in its opening brief that new statutes had been adopted]. The aforesaid facts are discussed further in Part II below regarding the material lodged by G&G.

## II

## DLSE'S COMPLAINT ABOUT THE DOCUMENTS LODGED BY RESPONDENT IS WITHOUT MERIT

G&G lodged three items with the Court: (1) a court order and brief by DLSE showing that DLSE recently asserted prosecutorial immunity for issuing Notices to Withhold; (2) legislative history for the statutory changes adopted by the legislature; and (3) the settlement agreement between G&G and DLSE which was filed with the District Court. The lodging of these documents

was appropriate for the following reasons.

The ruling by the California State Court that DLSE has prosecutorial immunity for issuing Notices to Withhold was issued on December 4, 2000. The ruling was issued on a motion for summary judgment by DLSE in a state court lawsuit wherein G&G was represented by counsel not involved in this case. G&G's counsel in this action was not aware of DLSE's assertion of prosecutorial immunity, or the ruling thereon, until after December 4, 2000. G&G believed that notifying the Court of DLSE's assertion of prosecutorial immunity was relevant and appropriate, because it is fundamentally inconsistent with the position asserted by DLSE in its opening brief. G&G believes that the Court should be aware that, while DLSE argues to this Court that its conduct is contractual in nature, it argues in other courts that it is prosecutorial in nature. G&G believes that bringing this fact to the attention of the Court is particularly important, given DLSE's ongoing practice of taking inconsistent positions in this case. For example, DLSE asserts in its opening brief that "The DLSE has continued to take the position in this litigation that equitable subrogation permits the subcontractor to stand in the shoes of the prime contractor and obtain a full and fair hearing under §§1730-1733 of the California Labor Code." *Petitioner's Brief* at p. 36. DLSE's brief seeks to create the impression that it has asserted throughout this litigation that a subcontractor has such a direct right of action. To the contrary, DLSE asserted precisely the opposite in the District Court and Court of Appeals. *Jt. App.* 98; *Appellee's Opening Brief in Court of Appeals*, filed on or about February 20, 1991, p. 13. DLSE's contention that a subcontractor has a direct right of action is a complete reversal of the prior position it asserted in this case. Similarly, DLSE asserts without citation to any facts, or authority, that the conduct which is the subject of this lawsuit is contractual in nature. However, DLSE argued exactly the opposite to the California Supreme Court in the case of *Lusardi v. Aubry* 1 Cal.4th 976, 4 Cal.Rptr.2d 837 (1992). DLSE contends in its brief to this Court that its actions are proprietary in nature, although it asserted exactly the opposite in the case of *Department of Industrial Relations v. Fidelity Roofs* 64 Cal.App.4th 411, 420; 70 Cal.Rptr.2d 465



(1977) ["DLSE asserted that it ' is the enforcing entity of the prevailing wage statute and . . . is not a participant in the various public works projects.'"] After having acknowledged for four years that this case was a challenge to the action of DLSE, DLSE asserted a lack of state action for the first time, four years after the action was filed. The issue was not raised until after this Court remanded the case to be reconsidered in light of *American Manufacturers v. Sullivan* 526 U.S. 40 (1999). G&G never had the opportunity to brief the issue in the Court of Appeals, as it was raised for the first time subsequent to G&G's briefs being filed. G&G submits that the issue was waived.

G&G disagrees with DLSE's contention that it should be allowed to assert inconsistent positions in different courts.

The lodging of the legislative history for the recent statutory changes adopted by the California legislature was appropriate because DLSE concealed the statutory changes from G&G, and this Court, until the filing of its opening brief. The statutory changes had been adopted prior to the granting of the Petition for Writ of Certiorari, and were pending when the Petition for Writ of Certiorari was filed. Nevertheless, DLSE failed to notify either this Court, or G&G, of the pending statutory changes. G&G was not aware that the statutes which were the subject of this lawsuit had been modified by the legislature until receiving DLSE's opening brief. Concurrent therewith, the United States filed a brief suggesting that the Court vacate the judgment in favor of G&G, on the basis of the statutory changes. *See, e.g., Superintendent v. Hill* 472 U.S. 445, 461 (1985) (Stevens, J. concurring and dissenting) ["It is not unreasonable to expect a state's highest legal officer to know the state's law and to bring to this court's attention the rules of state law that might affect the sound exercise of our discretion to grant certiorari . . ."]. It is conceivable that the Petition for Writ of Certiorari would have been denied, if DLSE had disclosed the statutory changes.

The time frame for filing briefs in this case was relatively short, with oral argument shortly thereafter. DLSE's concealment of the statutory changes forced G&G to research and address, both factually and legally, an issue that had not previously existed in the case. G&G submits that lodging

the legislative history with the Court was appropriate and proper, under the circumstances.

The third item included in the lodging was a copy of the settlement agreement between DLSE and G&G. The settlement agreement was before the District Court, and Court of Appeals. The settlement agreement was relevant merely to allow the Court to understand the factual circumstances under which this case arose. As explained in G&G's brief, this case was filed initially, dismissed without prejudice, and then re-filed. The motion for summary judgment which was granted in this case included a request for judicial notice, specifically requesting the District Court to take judicial notice of the documents on file in the previous lawsuit. *Jt. App.* at 174-175. The motion for summary judgment, which is included in the joint appendix, sets for the facts of the prior settlement agreement. However, the actual settlement agreement was not included in the joint appendix, and so it was included in the lodging.

The Court of Appeals considered the appeal of the attorney fee award in favor of G&G. The District Court found that G&G was entitled to recover attorneys fees for both the present action, and the prior action, which was dismissed without prejudice. The Court of Appeals affirmed the award of attorneys fees in this regard. The Court of Appeals was fully aware of the facts relating to the prior lawsuit, in connection with its consideration of the attorney fee issue. However, the attorney fee issue is not the subject of this Court's Writ of Certiorari. G&G believes that it was appropriate to include the settlement agreement with the documents lodged with the Court. As explained above, the settlement agreement is a part of the record that was before the District Court when the motion for summary judgment was heard. Obviously, the District Court was fully aware of the settlement agreement, having previously dismissed the case without prejudice in connection therewith.

## III

## CONCLUSION

During the five and a half years of this lawsuit, G&G has been required to contend with constant and repeated efforts by DLSE to confuse and evade the issues raised by this case. G&G



submits that DLSE's motion is another such effort. DLSE attempts to confuse the Court, and distort the record, by asserting, without any basis, that G&G's statement of facts regarding the Notices to Withhold is not based on the record in this case. G&G's statement of facts is based on the record before this Court, and meticulously cites the record. DLSE's statement of facts is untrue, and does not include any citations to the record. G&G's lodging of documents would not have been necessary if DLSE had informed the Court that it contended, in other courts, that its conduct was prosecutorial in nature; and had not concealed from G&G, and the Court, statutory changes scheduled to go into effect in July, 2001. It is respectfully submitted that DLSE's motion should be denied.

DATED: February 7, 2001

Respectfully submitted,

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**DECLARATION OF SERVICE BY MAIL**

Case No. **00-152**
**Lujan, et al. v. G&G**

I, the undersigned declare: my business address is 12424 Wilshire Boulevard, Suite 1450, Los Angeles, California 90025-1048.

I am over the age of eighteen years, not a party of the above-entitled action, and at the time of mailing, was employed ore resided in the County where said mailing occurred.

On February 7, 2001, I served the **OPPOSITION TO MOTION BY PETITIONERS FOR ORDER DISREGARDING [ALLEGED] IRRELEVANT AND IMMATERIAL MATTER, AND [ALLEGED] MATTERS OUTSIDE THE CERTIFIED RECORD IN RESPONDENT'S BRIEF AND FOR ORDER STRIKING RESPONDENT'S LODGING**, re Lujan, et al. v. G&G, by depositing a copy thereof, enclosed in a separate, sealed envelope, with the postage thereon fully prepaid, in the United States mail at Los Angeles, County of Los Angeles, California, which envelope was addressed as follows:

Thomas S. Kerrigan, Esq.
Thomas R. Fredericks, Esq.
DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
State of California
*Attorneys for Petitioners*
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Van Nuys, CA 91401
(818) 901-5482

Executed on February 7, 2001, at 12424 Wilshire Boulevard, Suite #1450, Los Angeles, California 90025-1048.

I declare under penalty of perjury that the foregoing is true and correct.

Judith V. Swanson
JUDITH V. SWANSON